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In the Supreme Court of the

United States

October Term, 1970

No. 605

ALAN RANDALL GREEN,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit

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For Petitioner

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Alan Randall Green, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on

June 24, 1970.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit printed in Appendix "A" hereto, infra, pp. i-xii (pursuant to the provisions of Rule 23(1) of this Court) and is reported in _____ F.2d _____ (June 24, 1970).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment in this case on June 24, 1970. (A copy thereof is set forth in Appendix "B", p. xiii.) Thereafter, a petition for rehearing was filed and denied by said court on July 22, 1970. (See Appendix "C", p. xiv.) On application of petitioner, that Court stayed an issuance of its certified copy of the said judgment to the trial court under Rule 41a of the Federal Rules of Appellate Procedure

pursuant to the provisions of Rule 41b of the same rules, pending the filing, consideration and final disposition of this petition by this Court, providing this petition is filed on or before August 22, 1970.

Petitioner invokes jurisdiction of this Court under the provisions of 28 U.S.C. §1254(1) and 1651(a) and U.S. Sup. Ct. Rule 19(b), 28 U.S.C.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a conviction is without due process of law where the evidence presented merely shows the convicted person's presence and possible knowledge that a criminal undertaking was afoot?

2. Whether there is a denial of due process of law where the trial court fails to give the defendant the right to rely upon the defense of entrapment so that the government can present its case in

chief to prove prior criminal disposition where the government's own case injects evidence of entrapment as a matter of law?

3. Whether a conviction is based upon a denial of due process wherein the evidence offered by the government to prove pre-disposition of criminality is insufficient as a matter of law and the effect of the government evidence was to expand the period of the conspiracy charged in the indictment and thereby amending the indictment?

4. Whether the erroneous charge (i.e. Count 3), dismissed by the trial court upon Petitioner's motion for a directed verdict of acquittal, enhanced the likelihood of the jury convicting (rather than acquitting or hanging on a properly submitted charge), thereby denied petitioner of due process of law?

5. Whether the Sixth Amendment to the United States Constitution requires a reversal of conviction when jurisdiction and venue are in a district other than the one in which the petitioner was tried?

6. Whether the taping of conversations transmitted by secretly installed microphones, secretly planted transmitters and telephone taps surreptitiously made of telephone conversations between a consenting informant and non-consenting suspect is illegal and in violation of the 4th and 5th Amendment rights of the suspect as well as Section 605 of the Federal Communications Act?

7. If so, does constant direct reference to the contents of the tapes by the prosecutor during the trial in the presence of the jury, without attempting to admit the tape recordings themselves, together with the presence

of the tape recorder in the court room during the trial, violate the same rights of petitioner?

8. In any event, where a government agent testifies that there was no question but that the tapes did, in fact, assist in the investigation of the case, is an evidentiary hearing required under Alderman v. United States, 384 U.S. 165, 89 S.Ct. 961 (1969)?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourth Amendment to the United States Constitution:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by the Oath or affirmation, and particularly describing the place to be searched, and the

person or things to be seized."

Fifth Amendment to the United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment to the United States Constitution: (In pertinent part)

"In all criminal prosecutions, the accused shall enjoy the right to a speedy

and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; * * *"

18 U.S.C. §2:

PRINCIPALS

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. §371:

"If two or more persons conspire either to commit any offense against the

United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both. * * * "

21 U.S.C. §176a:

"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought

into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000.00. * * * "

47 U.S.C. §605, Section 605 of the Federal Communications Act (provides in pertinent part):

"[N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, * * * or meaning of such intercepted communication to any person."

STATEMENT OF THE CASE

1. Proceedings Below:

On March 5, 1968, a three count indictment was filed with the clerk of the United States District Court for the District of Nevada charging petitioner (together with several and diverse other

persons) in Count 1 with violation of 18 U.S.C. 371 (conspiracy to unlawfully import marihuna into the United States between the dates of December 29, 1967 and February 25, 1968); in Count 2 with violation of 21 U.S.C. 176a and 18 U.S.C. 2 (unlawful importation of marihuana in the District of Nevada on February 25, 1968); and, in Count 3 with violation of 21 U.S.C. 176a and 18 U.S.C. 2 (receipt, concealment and facilition of transportation and concealment of unlawfully imported marihuna in the District of Nevada on February 25, 1968.) (C.T. 3-7)

Before trial petitioner filed a motion to suppress the marihuna which was the subject of the three counts of the indictment, as well as illegally obtained tape recordings (C.T. 96), which motion was denied by the trial court. (C.T. 135) Petitioner also

filed a pre-trial motion for severance of the offenses and for separate trials (C.T. 92), which motion was denied. (C. T. 133)

Jury trial commenced on April 7, 1969 and during the trial, and at the conclusion of the government's case, petitioner moved the court for judgements of acquittal as to all 3 counts of the indictment. (R.T. 538-540; 743-744) The motion was granted as to all defendents as well as to petitioner, as to Count 3, but was denied as to Counts 1 and 2 as to petitioner (R.T. 744)

After the government rested its case in chief a very unique proceding took place. On motion of the government, petitioner was forced to make an election to assert the defense of entrapment. The consequences of this election were that the government was allowed to reopen its case and present

(under the label of "pre-disposition as to criminality") further evidence against petitioner which, in effect, expanded the dates of the conspiracy alleged in Count 1 of the indictment back to July, 1967, with testimony by the same witnesses who had earlier testified against petitioner regarding the alleged conspiracy charged in Count 1. A further consequence of the election was that petitioner was forced to take the witness stand, testify in his own behalf and waive his 5th amendment rights of self-incrimination. (C.T. 192; R.T. 506-508, 538-550)

At the close of evidence, petitioner renewed his motion for directed Judgement of acquittal as to Count 2, which said motion was denied. (R.T. 744).

The jury found petitioner guilty of Counts 1 and 2, the remaining counts

upon which they deliberated. (C.T. 200). On May 29, 1969, petitioner was sentenced to imprisonment for 6 years on each count, concurrently. (C.T. 235)

2. Statement of the Facts:

A few days prior to December 29, 1967 (the earliest date alleged in the conspiracy count of the indictment as the date of the formation of the conspiracy charged herein), Jack Bernard Smith made an agreement while in custody to act as a special employee for the United States Government in making a case against petitioner and one Nick Pappas. The details of this agreement are set forth hereinafter. From this date until the date of petitioner's arrest, Smith was acting in the capacity of an informant and "special employee" for the government. 1/

1/ Agent Diaz candidly admitted under oath that he directed Smith to make a case against petitioner as a special employee of the government. (R.T. 377, 594-6.)

Smith had lived in Mexico off and on for 9 years (R.T. 369) and was "pretty well known there". (R.T. 370).

Smith alone had established a source of bulk marihuana in one "Manuel" his so-called connection in Culiacan, Mexico. (R.T. 293).

Smith told the court and jury that he and another person had smuggled marihuana from Culiacan to the United States for a period of four or five months in 1967. (R.T. 406). 2/

Prior to the dates set forth in the indictment and on November 13, 1967, Smith was arrested in the District of Nevada for smuggling marihuana into the United States from Mexico and was removed to the Central District of California. While still in custody in Los

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2/ Of all the defendants in the trial, Smith was the only one that spoke Spanish and could "deal" with Manuel. (R.T. 295).

Angeles and after he had been incarcerated for a period of 40 days, Smith had a conference with Customs Agent Harold L. Diaz. This conference resulted in an agreement whereby Smith would be released to go to Las Vegas, Nevada, to make the case against petitioner and Pappas. Smith was released without posting bail and went to Las Vegas, as agreed, where from that time until petitioner's arrest, Smith was under constant instructions from Agent Diaz concerning his actions. (R.T. 268; 274, 377, 380).

Smith's expenses during this period were defrayed by Diaz. (R.T. 407).

Smith reported to Diaz in Las Vegas and saw him almost daily. (R.T. 399,400).

On February 10, 1968 Smith and Pappas flew to Culiacan, Mexico, traveling on Aeronaves de Mexico from Tucson, Arizona. (R. T. 288, 293).

In Culiacan, Smith set up a meeting for the following day with Manuel at Manuel's house. (R.T. 293). Manuel does not speak English and Pappas does not speak "Mexican", and at the meeting, Smith negotiated and did the bargaining with Manuel to purchase 300 kilo's of marihuana at a price of $8.00 per kilo. (R.T. 294, 295).

Smith returned to the United States after the negotiations were completed and immediately went to agent Diaz in Los Angeles to report. (R.T. 296). Shortly thereafter, Pappas returned to Las Vegas. (R.T. 309).

On February 22, 1968, after Smith had arranged for the type airplane to be rented and the manner in which it was to be fueled, Smith and Defendant Bobby Bates flew the rental plane from Parker Lake, Arizona, to Culiacan, Mexico. 3/

3/ Though Bates is a pilot, he is not a very good one. (R.T. 672).

Smith was at the controls of the plane on the take-off from Parker Lake, during the flight to (and landing at) Culican, where they met Manuel. (R.T. 331).

Bates, also, does not speak "Mexican", and, again, all conversations with Smith's connection (Manuel) were in Spanish. (R.T. 332, 333).

Though there was conversation between Manuel and Smith that the payment for the load was short, Smith was allowed to take the full load on partial credit. (R.T. 334). 4/

Smith, Bates and the Mexicans loaded the aircraft with the marihuana in Culiacan.

Smith was at the controls at take-off and took the plane to flight altitude where Bates took over the controls and,

4/ Smith had established a line of credit with Manuel for such contraband long before the dates set forth in petitioner's indictment. (R.T. 574).

flew the craft to Parker Lake, Arizona. (R.T. 335).

Smith directed the return, referring to a large chart for dead reckoning navigational purposes during the return flight. (R.T. 427).

For a long time prior to the dates set forth in the indictment, Smith alone had the air maps of Mexico.

Smith alone knew how to fly under the Customs radar screen and Diaz was well aware of this before obtaining Smith's release from jail in the Central District of California. (R.T. 279, 382, 420).

Smith was the only person who knew all the contacts in Mexico. (R.T. 420).

Smith alone furnished the air maps on the route to Mexico for radar avoidance. (R.T. 427).

Smith was the only person who had the knowledge of the proper type aircraft needed for the purpose of illicitly flying

marihuana into the United States. (R.T. 289).

Part of the cross-examination of Smith elicited the following testimony:

Q: "Would it be a fair statement for you to say that without your aid this thing couldn't have come off?"

A: "In Culiacan?"

Q: "Yes."

A: "To the best of my knowledge, I don't know how Nick Pappas or Green [i.e. petitioner] could have done it. They possibly knew somebody."

Q: "As far as you knew, you were the guy that had to get this on; is that right?"

A: "That is right." (R.T. 421,2).

Immediately after Smith and Bates landed at Parker Lake in the District of Arizona, they were arrested by Customs agents. Diaz boarded the aircraft with Smith and Bates and the three of them

flew to Nogales in the District of Arizona where Smith and Bates were "booked". (R.T. 337). During this flight, Bates was at the controls of the plane while Agent Diaz had his service revolver exposed at all times. (R.T. 53; 59).

After the event at Nogales, Diaz, Smith and Bates boarded the same aircraft and flew to Boulder City in the District of Nevada, followed by a government aircraft which landed with them. (R.T. 337).

At Boulder City, Nevada, Agent Diaz debarked from the airplane and the load of marihuana was rearranged. Smith and Bates took-off with the load of marihuana, Smith flying, and flew to Searchlight, to an area on Nipton Road, to Jean and then landed at North Las Vegas Airport all within the District of Nevada. (R.T. 338). 5/

5/ All of this was done at the direction of Agent Diaz. (R.T. 57).

After landing at North Las Vegas, Smith called Pappas on the telephone and petitioner drove Pappas to the airport. (R.T. 662). Pappas asked petitioner to take him to the airport because Smith had earlier wrecked Pappas' automobile (R.T. 297) and because petitioner (who shared an apartment with Pappas) was Pappas' employer and had helped Pappas with transportation when petitioner was not working. (R.T. 659) [Up to the time of his arrest in this case, petitioner was employed by the Alladin Hotel as executive advisor to the vice-president. (R.T. 656). Petitioner employed Pappas as his "eye in the sky". (R.T. 624, 639) 6/]

On the arrival of petitioner and Pappas at the airport, Smith got into

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6/ An "eye in the sky" sits behind one-way mirrors and watches the gamblers and dealers to see that the clubs are not cheated. (R.T. 639).

petitioner's car and petitioner started to drive away (R.T. 662) when Smith told petitioner to "wait a minute. We got something on the plane." (R.T. 662). In response thereto, petitioner turned the automobile around and drove it to the plane and opened the trunk. While petitioner was lighting a cigarette by the drivers door of the car, Agent Diaz drove up in the "Follow Me" truck and placed him under arrest. 7/ Petitioner did not touch any of the bags of contraband in the plane. (R.T. 663). He did not know that there was marihuana in the airplane when he took Pappas to the airport to pick up Smith at the time of petitioner's arrest. (R.T. 679).

Although the prosecutor made a

7/ A "Follow Me" truck is a truck used at most commercial airports. It is a truck which has large letters viewed from the back which state, "Follow Me". This is a direction to visiting aircraft to locate the proper place for tying down.

strong effort on proof as to what he was going to show as to petitioner's criminal pre-disposition, the only evidence offered as to pre-disposition was the testimony of Smith, his wife and Avery Pipes. There was no evidence whatever adduced to corroborate what they said.

A summary of Smith testimony is as follows:

Smith testified that from and after July 1, 1967 that he had two conversations with petitioner wherein the subject of smuggling marihuana was discussed. (R.T. 555, 561). Smith testified that he smuggled a load of marihuana from Mexico to the United States by airplane in the latter part of October or first part of November, 1967, and that he made a "drop" on Tipton Road where petitioner and Pepas were waiting to pick it up. (R.T. 559). 8/

8/ Petitioner categorically denied the conversations and denied his presence at the "drop" area. Pepas admitted he was present at the "drop" but denied petitioner's presence.

Mrs. Smith stated that petitioner gave her $200 for expenses and took her to the airport to go to Culiacan to arrange for a "buy" of marihuana from Manuel. (R.T. 584). She then admitted that her father lives in Culiacan and that she was a courier on the trip for her husband to tell Manuel "everything was alright" and that, in fact, she had money with her to pay Manuel for a load of marihuana previously smuggled by her husband which he had gotten from Manuel on consignment.

Agent Diaz testified that he had received information implicating petitioner in the illicit smuggling of marihuana from an admitted smuggler, Martin Moultin, and another informant who remained unnamed. (R.T. 593, 595-7). 9/

Evidence of illegally obtained

9/ There was no attempt whatever to establish the reliability of Moultin or the unnamed informant.

electronic recordings.

Prior to trial, petitioner brought a motion to suppress all tape recordings of conversations pursuant to Rule 41e, Federal Rules of Criminal Procedure. (C.T. 96). The motion was denied. (C.T. 135). That the recordings existed is not denied. The government admitted their existence in its answer to petitioner's Demand for Bill of Particulars (C.T. 106, 107) and furnished petitioner's counsel with approximately 1,000 pages of transcriptions of such recordings. (C.T. 109).

The prosecutor did not attempt to place the recordings into evidence directly.

Indirectly, the fact of the existance of the tapes was constantly before the jury. 10/ During the entire trial,

10/ Customs Agent John W. Enochs stated that there was no question that the tapes did assist in the investigation of this case. (R.T. 449).

the tape recorder and amplifier together with the tapes were in the courtroom before the jury. (R.T. 698).

In the presence of the jury, Agent Diaz was asked by the prosecutor whether Smith had a monitoring device on him while Smith was in petitioner's apartment in Las Vegas on February 16, 17 and 18, 1968. (R.T. 683-6). The jury was excused and, although Diaz testified the recordings were made without first obtaining a search warrant, the court sustained the objection to admissibility based on its "discretion." (R.T. 697).

The jury heard the following testmony adduced by government witnesses while the tapes and electronic equipment for their reproduction were in the courtroom during the course of the trial:

On February 8, 1968, Pappas and Smith were in the Holiday Inn near Los Angeles International Airport. By

pre-arrangement of the agents and Smith, Pappas and Smith registered in Room 510. The agents were in Room 511. Room 510 was "bugged" by putting a microphone under the light switch-plate. (R.T. 298; 378, 379).

While at petitioner's apartment during the dates alleged in the conspiracy count, Smith was carrying a monitoring device and transmitting the conversations, which were recorded by pre-arrangement with Customs Agent Diaz. (R.T. 381). 11/

Smith's telephone conversations to petitioner's apartment were taped and recorded by customs agents. (R.T. 385).

After his release from custody in Los Angeles, Smith was "wired for sound" and continued wearing monitoring devices "right up to the end." (R.T. 307). 12/

11/ Petitioner's apartment was in a 4-plex and customs agents were in an adjoining apartment in the same unit recording the transmitted conversation from therein. (R.T. 387,8).

12/ Under direction of Agent Diaz, these devices were taped under his armpits, his groin, or inside his thigh. (R.T. 309).

Beside the above, the prosecutor continually alluded to the existence of the tapes in a testimonial manner in the presence of the jury in the following manner:

After Smith had testified as to the contents of a conversation at Winterwood Golf Course on February 21, 1968. (Smith's veracity being in issue), the prosecutor called Agent Diaz who testified that the conversation had been transmitted and taped. The prosecutor then stated to the court, "I might note, your Honor, I didn't offer the contents of the conversation." (R.T. 493).

When co-defendant Pappas was on the stand, referring to the tapes (the veracity of Pappas being in issue), the prosecutor inquired, "Do you want to listen to them?" (R.T. 666). This, of course, drew a negative response from Pappas.

The following cross-examination was had between the prosecutor and the petitioner regarding the contents of an alleged telephone call from Pappas in Mexico to petitioner's apartment (Petitioner's veracity being in issue as well as Smith's):

Prosecutor: "Isn't it true, Mr. Green, that there was a conversation between you and Mr. Isbell at that time regarding a pilot and the fact the pilot wasn't around --?"

(An objection interposed by trial counsel for petitioner was sustained.)

Prosecutor: "Your Honor, I offer to prove the conversation. I can play a tape recording. (Emphasis added)

(Defense objection, overruled.)

Prosecutor: "Didn't you have a conversation with Mr. Isbell about the fact that you had been waiting for a long distance telephone call from a

pilot, but he wasn't here, but you couldn't tell that to Nick [Pappas] through all the connections down in Culiacan?" (R.T. 666).

In final argument, the prosecutor continually referred to the existence of the tapes and in order to bolster the credibility of Smith made the observation to the jury that Smith had been "wired for sound" but "there was nothing illegal about that." (R.T. 797).

The financing arrangements to purchase the marihuana from Manuel in Culiacan:

Smith testified that Pappas told him that Hahn (a co-defendant) had given Pappas $4,000 as his share in the operation. (R.T. 281). At another point, he testified that Hahn and Nicotero (a co-defendant) had put up approximately $2,500, each. (R.T. 300). In any event, Pappas only paid Manuel $2,000. (R.T. 294).

When Smith and Bates arrived in Culiacán to pick up the 300 kilo's, Manuel told Smith that Pappas had been short seven hundred plus dollars and that it was going to be a short load. After a conversation only understood by Smith and Manuel, the full 300 kilo load was entrusted to Smith despite the shortage of seven hundred plus dollars. (R.T. 334).

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

(i.e. The Court of First Instance)

The district court's jurisdiction was asserted under 18 U.S.C. 3231.

Pre-trial and mid-trial motions to suppress were argued at length and denied; motions to sever parties and causes were heard and renewed during the trial and denied. Appropriate objections to evidence and testimony all appear in the record; and, motions for judgment

of acquittal were made by petitioner and granted in part only, that is, to Count 3. The questions were again raised in motion for new trial, and in petitioner's briefs to the Court of Appeals as well as in his petition for rehearing therein.

REASONS COMPELLING THE ALLOWANCE OF THE WRIT

1. Mere presence and possible knowledge that a criminal undertaking is afoot is not sufficient to sustain a conviction due to the "due process" clause of the Fifth Amendment.

Petitioner has detailed the facts herein so that this court may determine that in the light most favorable to the prosecution, he would be denied "due process" of law if his conviction as to both counts were allowed to stand.

Petitioner had no financial stake in the transaction. He shared an apartment with co-defendant Pappas and was

allegedly present during certain conversations. Special employee Smith had wrecked Pappas' automobile and petitioner helped Pappas by way of transporting him on petitioner's days off. Petitioner was Pappas' employer. Petitioner drove Pappas to the airport at the time of their arrest. He started to drive from the airport when Smith asked him to return to the plane.

In United States v. Ah Kee Eng (1957), 241 F.2d 157, a conviction of a defendant who agreed to buy narcotics from two others who had just docked in this country and came to his house directly from the boat was reversed for insufficiency of evidence, the court holding the evidence not enough to show that he had imported a narcotic and knew it. See also Washington v. United States (1958), 357 U.S. 348.

Other factual situations held to

be insufficient are found in Robinson v. United States (9th Cir. 1959), 262 F.2d 645, where the defendant gave the informer a telephone number, a call to which resulted in the purchase. The Ninth Circuit held it to be a warranting suspicion but hardly sufficient to sustain a verdict of guilty when the defendant "simply drove the automobile containing the box (of opium) to the express office at the request of Rosa (the Government's principal witness), aided him in removing the box from the automobile, told him to do as instructed, then did not wait for him at the express office. Ching Wan v. United States (9th Cir. 1929), 35 F.2d 665.

Where two defendants were seen in various places in an automobile at about the time the sales were being made, the conviction was reversed in United States v. Pisano (9th Cir. 1951),

193 F.2d 355.

A similar case is United States v. Bonanzi, 94 F.2d 570, wherein the court characterized such proof as "colorless evidence".

An appreciation of the mere presence "at the scene" was analized by the Fifth Circuit in United States v. Hendrix (5th Cir. 1964), 327 F.2d 560:

> "We can find no evidence in the record that could properly permit the submission of the issue of guilt or innocence of appellant, Torbert, to the jury in absence of any testimony connecting her with the cashing of one or more of the forged checks. Her presence when Shelton delivered the blank checks, the typewriter and the identification cards to Hendrix and her presence in the car on the trip from Mobile to Pascagoula might well show knowledge by her that a criminal undertaking was afoot. But these facts do not show that she was a participant, either as a principal or as an aidor or abettor. Nye & Nissen v. United States (1949) 336 U.S. 613, 69 S.Ct. 766; United States v. Garguilo (2d Cir. 1952), 310 F.2d 249."

Certainly, the most that can be

said about petitioner's activities regarding the crimes charged herein is that he might have knowledge that a criminal undertaking was afoot. The mere fact that Green conversed with Smith or was present when Smith and Pappas were discussing the venture simply is insufficient to sustain his conviction. We submit that a conviction on insufficient evidence is a denial of "due process" of law under the Fifth Amendment.

Far more fatally defective to the government's case is the fact that there is no evidence whatever by admissions of the defendants, or otherwise, that the load was not properly invoiced or the tax had not been paid.

"Contrary to law" is an element of violation of 21 U.S.C. 176a which must be proved positively by the government beyond a reasonable doubt as much

as any other element in the offense. In this regard, when the substantive Count 2 fails, the conspiracy Count 1 must fall with it.

2. There was a denial of due process of law and petitioner's privilege against self-incrimination in violation of the Fifth Amendment when the trial court forced petitioner to elect to rely upon the defense of entrapment.

The error was compounded when the government was allowed to re-open its case in chief to offer proof as to predisposition of criminality where the government's own case injected the fact of entrapment as a matter of law.

The government's financial stake in the contraband (use of Smith's credit to purchase part of the marihuana in Mexico) establishes entrapment as a matter of law.

The detailed evidence of entrapment by Agent Diaz and Special Employee Smith

in the case at bench is overwhelming and petitioner was entrapped as a matter of law. See Notaro v. United States (9th Cir. 1966), 363 F.2d 169; Sorrells v. United States (1932), 287 U.S. 435, 53 S.Ct. 210; Sherman v. United States (1958), 356 U.S. 369, 78 S.Ct. 819; and, Pratti v. United States (9th Cir. 1968), 389 F.2d 660.

The defense of entrapment is an enigma. Students of law and law scholars have discussed it during the past half century. Its existence is admitted but, in common practice, it has been criticized as being a failure.

In 1958, four Supreme Court Justices characterized the entrapment defense as "gropingly express[ing] the feeling of outrage at conduct of law enforcers * * * but without the formulated basis in reason that is the first duty of the courts to construct." Sherman v. United States,

supra, at page 378 (Concurring Opinion).

In Sherman, at p. 372, the Court equated entrapment with the unlawful search and the coerced confession. Thus, it appears that "due process" limits solicitation to the purpose of crime detection and does not leave room for any improper influence by law enforcement officers to entice an innocent person to commit an act, which (similar to a confession) will be used against him.

This Court set forth certain constitutional prohibitions to obtaining confessions in Malloy v. Hogan (1964), 378 U.S. 1, 84 S.Ct. 1489:

> "* * * [A confession] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." (Emphasis added.)

Equating the confession to the defense of entrapment, the use of

improper police influence is violative of the privilege against self incrimiation. Also, Due process would bar the conviction of any innocent person for a solicited offense where the moving force and instigator is the government.

It has been pointed out recently that the rationales behind the defense of entrapment include estoppel, constitutional due process (Raley v. Ohio, 360 U.S. 423), actual innocence, public policy, and preservation of the integrity of the law. (7 Cr.L.2159, 1970)

Although majorities in both Sorrells and Sherman stressed innocence, large minorities in each case emphasized the absence of police misconduct - i.e. the integrity of the law rationale.

An enlightened and refreshing decision has been rendered in the United States District Court for the Central District of California. In United States

v. Chisum, _____ Fed.Supp._____, 7 CrL 2159, (U.S.D.C. Cal. April 24, 1970), the District Court held that where a federal agent delivers and supplies the contraband there is entrapment as a matter of law. We are not suggesting that this decision is binding upon this Court but suggest that the reasons stated therein are logically pursuasive and pointed.

In Chisum, there was no question but that the defendant intended to illegally possess counterfeit money and that this intent was his own creation.

The Court stated:

> "The research of the court has found only a few cases where the facts were similar to those here-that is, the government furnished the defendant with the contraband which constituted the crime. * * *"
>
> "Were the courts to sanction the law enforcement activities committed in this case, it would transform the laws designed to promote the general welfare into a technique aimed at manufacturing disobedience in order to punish, a

> concept thoroughly repugnant to constitutional principles. When the government supplies the contraband, the receipt of which is illegal, the government cannot be permitted to punish the one receiving it." (Emphasis added.)

Thus, by logic, no matter what theory is applied to the facts in the case at bench (constitutional due process, estoppel, actual innocence, public policy or preservation of the integrity of the law) the defense of entrapment has been established as a matter of law. Smith was not only the arranger, bargainer, man with the knowledge of flying under the radar screen, man with the navigational maps, man who knew what type of plane to use, experienced pilot, but it was his credit with Manuel that was utilized by the government to get the contraband loaded into the airplane in Mexico for transportation to the district of Arizona where the contraband was first seized by Customs Agent Diaz.

In any event, the trial court erred in forcing petitioner to make an election as to whether he was going to rely upon the defense of entrapment.

Where the government's own case in-chief injects substantial evidence of entrapment into the case, the accused is entitled to raise the defense by motion for acquittal and by requested instructions to the jury.

In Soars v. United States (5th Cir. 1965), 343 F.2d 139, the court stated that where evidence of entrapment is injected in the government's case in chief, the defendant is entitled to have the jury instructed that if they find that he committed the acts charged, they must further consider whether he was entrapped into committing them.

The effect of the election forced by the trial court herein was to have petitioner give up his absolute right not to testify in order to explain his

presence and his conversations with informant Smith and other persons who had been charged in the indictment.

3. The evidence submitted by the government as to criminal pre-disposition of petitioner was insufficient as a matter of law.

The effect of the trial court allowing the evidence as to pre-disposition was to amend the indictment on its face to expand the period of the conspiracy charged in Count 1 to a period substantially before the dates set forth in the indictment.

The dates of the conspiracy alleged in Count 1 of the indictment were from December 29, 1967 through February 25, 1968. After the issue of entrapment was established by the government's own evidence and after the government rested its case in chief, the issue of election was discussed for the first time in the record. With the "fish or cut bait" mandate,

petitioner elected to rely upon the defense of entrapment. The trial court then permitted the government to reopen its case to offer evidence of petitioner's pre-disposition for criminality. Informant Smith, his wife and Agent Diaz gave oral testimony against petitioner that was unsubstantiated in any respect by other evidence. They talked about matters which had supposedly occurred as far back as July, 1967, involving discussions of smuggling. The petitioner took the stand and denied inculpatory testimony of the government witnesses. Obviously, the petitioner was not prepared to defend himself for acts not charged within the indictment.

He could only deny that the events took place. He did not have sufficient time to secure evidence other than his own testimony.

Petitioner was denied due process of law under the 5th Amendment and a

trial as guaranteed by the 6th Amendment for two reasons:

1. The uncorroborated oral testimony of the government witnesses was insufficient as a matter of law to prove criminal pre-disposition, and

2. The effect of the testimony by the government witnesses was to amend the indictment on its face and force the petitioner to defend himself for criminal activity not set forth in the indictment.

In Hansford v. United States (App. D.C. 1962), 303 F.2d 219, it was pointed out by the court that the government has the burden of proof to prove criminal predisposition, because of the settled rule that it is ordinarily reversible error for the trial court to admit evidence of an offense other than the one on trial, the character of the proof becomes of consequence. It held that reason suggests that the danger to the fairness

of a trial required that when the inquiry is into past offenses it should be controlled in some reasonable manner.

In holding the uncorroberated oral testimony of the government agent as to prior sales so prejudicial to the accused in his defense of the charge to outweigh the probative value of the testimony on the issue of pre-disposition, the Hanford court stated:

> "* * * There was no arrest for the alleged prior offense and thus no indictment or conviction. In these circumstances the defendant had no opportunity to prepare to defend against this other charge and no means of combatting it, save by his own unsupported testimony in denial of the officer's testimony. * * *"

Petitioner and Hansford were in similar positions and the court's logic in Hansford should control.

It is established that an indictment cannot be amended on its face. See People v. Colombo (Calif. 1924), 70 C.A. 489, 233 P. 413, wherein the court discussed in volume the holdings of the

various states and the federal cases in this regard.

The purpose of the indictment is du-fold, to establish jeopardy and to inform the accused of the charges against which he must provide a defense.

In this case, the action of the trial judge in allowing the uncorroborated testimony offered by the government as to pre-disposition had the effect of amending the indictment on its face thereby enlarging the dates of the alleged conspiracy without giving petitioner sufficient notice of the charges of which he was to defend himself. Notice is a due process question.

4. The erroneously drafted charge (Count 3), which was dismissed by the trial court upon petitioner's motion for a directed verdict of acquittal, enhanced the likelihood of the jury convicting, rather than acquitting (or

hanging) on the properly submitted charge, thereby denying petitioner of a trial with due process of law.

The thrust of petitioner's position is that by improperly joining Counts 2 and 3 (the substantive counts wherein no jurisdiction or venue is present), the prosecutor forsaw that the trial court was going to grant a directed judgment of acquittal as to the erroneously drafted counts. As a result of the granting of the motion as to the erroneously drafted count, there is an inference drawn by the jury that the trial court has some reason to believe that the defendant is guilty of the properly drafted count; and, therefore, makes such a finding. Such must necessarily be a denial of due process.

A somewhat similar situation is found in United States ex rel. Hetenyi v. Wilkins (C.A. 2d 1965), 348 F.2d 844, cert. denied (1966) 383 U.S. 913.

Therein, the Second Circuit (per Marshall, J.) found prejudice in the submission of a first degree murder charge - barred by the double jeopardy prohibition - even though the jury found the defendant guilty of the lesser and included offense of second degree murder. Rejecting an inquiry into whether the accused was actually prejudiced by the erroneous submission, the court held that there was a reasonable possibility that the conduct of the trial and the deliberations of the jury were affected by the fact that Hetenyi was charged with first degree murder. It also discussed the constitutional aspect involved in order to reach its decision.

The court in Hetenyi was apparently concerned with the effect of the charge in the indictment upon the jury deliberation together with the constitutional ramifications.

A parallel exists where (1) the defendant is erroneously over-charged in one count and (2) where one properly drawn count is joined with one or more improperly drawn counts (especially where the improper count, or counts, improperly alleges venue and/or jurisdiction.) The over-charging results in the possiblity of a compromise verdict by inducing a doubtful jury to find the defendant guilty of the less serious offense rather than to continue to deliberate as to his innocence.

Where the trial court grants a directed judgment of acquittal as to an improperly charged count (or counts), the debate as to innocence never occurs and the deliberations of a doubtful jury must only be as to the defendant's guilt because the trial court has inferred his guilt as to the improperly charged count(s) by the directed judgment.

The underlying constitutional defects occur in both instances, "double jeopardy" in Hetenyi (i.e. Fifth Amendment) and improper jurisdiction and venue herein (i.e. Sixth Amendment.)

5. The jurisdiction and venue of the offense charged in Count 2 was in the District of Arizona and petitioner was tried in the District of Nevada. The Sixth Amendment compels a reversal of conviction on this ground.

The contraband herein was seized in the District of Arizona. It's transportation to the District of Nevada was at the command, and under the control of, Diaz. The position of the government is that the importation did not cease until it reached the District of Nevada. 13/

13/ If the government's position is correct in this regard, then the port of entry would be North Las Vegas Airport and Agent Diaz would have had to determine whether the defendants had any merchandise to declare or determine whether it was properly invoiced prior to making the arrest for illegal importation. If the port of entry is Parker Lake, Arizona, the same requirement would attach.

Being in custodia legis, the marihuana had lost any kind of contraband character it might have had.

The question was pondered by the trial court (R.T. 510).:

> "The Court: The only problem on Counts 2 and 3 is one of causation. Who caused the transportation from Arizona to Nevada? If it wasn't caused by the conspirators, they can't be responsible for it."

and

> "The Court: If we are just talking about tansportation to Arizona, this District doesn't have any venue of the offense."

As to Count 2, unlawful importation of marihuana in the district of Nevada, it is conceded that when the marihuana was seized and Bates and Smith were placed under arrest in the district of Arizona, the conspiracy (if any) was terminated.

A similar situation is found where stolen property has been recovered and the thief makes an agreement with the

owner to sell the identical property to the "fence". The "fence" unknowingly purchases the same property from the thief at one-half the value, believing the property to be stolen.

In the leading case of People v. Jaffe, (N.Y. 1906), 185 N.Y. 497, 78 N.E. 169, New York's highest court announced:

> "* * * the goods which the defendant intended to purchase had lost their character as stolen goods at the time of the proposed transaction. Hence, no matter what was the motive of the defendant, and no matter what he supposed, he could no act which was intrinsically adapted to the then present successful perpetration of the crime denounced by this section of the Penal Code, because neither he nor any one in the world could know that the property was stolen property inasmuch as it was not, in fact, stolen property. * * *"(p. 170)

Jaffe is cited with approval in People v. Jelke (1956), 1 N.Y.2d 321, 329, 152 N.Y.S.2d 479, 135 N.E.2d 213.

It was impossible in fact and law

to commit the importation in the District of Nevada in petitioner's case. Venue and jurisdiction to try petitioner for violation of 21 U.S.C. 176a would necessarily be in the District of Arizona. The Sixth Amendment provides that the accused shall have the right to a trial in the district wherein the crime shall have been committed.

There is no question but that Count 2 must be reversed.

6. The taping of conversations transmitted by secretly installed microphones, secretly planted transmitters and surreptitious telephone taps of conversations between consenting informant and non-consenting suspect is illegal and in violation of the 4th and 5th Amendment rights of the suspect as well as Section 605 of the Federal Communications Act.

In the case at bench, the evidence

shows that there was electronic surveillance of almost every method known to law enforcement. Special employee Smith was wired for sound. The agents, by prearrangement, bugged his conversations at the Holiday Inn at Los Angeles International Airport by placing a microphone under the light switch-plate and recording the conversations in an adjoining room. Smith wore a transmitter when he visited petitioner's apartment on various occasions. The agents recorded the conversations in petitioner's apartment from an adjoining apartment. The agents placed a recording device on the telephone in order to record Smith's conversations. None of the defendants gave permission for the recordings. Prior to trial, transcripts of the recordings were made available to the defense. During the trial, the tape recorder was visisble to the jury in the courtroom.

Though constant reference was made to the tapes, they were not offerred into evidence or played before the jury. The prosecutor continually referred to the contents of the tapes in a testimonial manner in his direct and cross-examination.

Without going into a thorough discussion of the law (of which this Court is well aware), petitioner would like to point out to the court present cases docketed in October Term, 1970:

United States v. White, No. 13, proposes the question as to whether the consent of one party (the informer or special employee) to a bugging of a two-man conversation makes the bugging legal.

Marchese v. United States, No. 34, raises the question, "Did the hiding of an electronic device on a government informer that enabled the agents to overhear a narcotic suspect's conversation

with the informer violate the suspect's right of privacy and his Fourth Amendment rights or his privilege against self-incrimination?

Koran v. Florida, No. 50, is certified with the question: "Did the admission of tape recordings of the defendant's oral and telephone conversations after he had elected not to testify at his trial constitute a violation of his 4th and 5th Amendment rights even though electronic surveillance occurred prior to the decision in Katz v. United States (December 18, 1967), 389 U.S. 347. No question of prospective application occurs with the case at bench.

Teran v. California, No. 86, certifies the question: "Was Section 605 of the Federal Communications Act violated by a telephone company's monitoring, recording, and transcribing telephone calls made by a gambling suspect and divulgence of these records to law enforcement officials?

It is submitted that this Court should certify, on similar grounds, the question of whether the taping of conversations transmitted by secretly installed microphones, secretly planted transmitters and surreptitious telephone taps of conversations between a consenting informant and a non-consenting suspect is illegal and in violation of the 4th and 5th Amendment rights of the suspect as well as Section 605 of the Federal Communications Act?

Secondly, if the taping is illegal, does constant and direct reference to the contents of the tapes in a testimonial sense, without the admission of the contents of the tape recordings themselves, together with the presence of the tape recorder in the court room in the presence of the jury during the trial violate the same rights of the defendant as "fruits of the poisonous tree"? Nardone v. United

States (1939), 308 U.S. 539, 60 S. Ct. 103.

7. Because of the above illegality, the constant and direct reference to the contents of the tapes in a testimonial manner by the prosecutor during the trial and in the presence of the jury, without any attempt to admit the tape recordings (together with the presence of the tape recorders in the courtroom during the trial) violated the same rights of petitioner.

Without going into extensive argument, we draw the courts attention to Nardone v. United States, supra, and submit there should be no question that if our primary promise is correct, the deductive conclusion must be that we have "fruits of the poisonous tree".

8. In any event, petitioner is entitled to an evidentiary hearing before the United States District Court to determine constitutional defects where the

surreptitiously obtained tapes assisted the government in the investigation of the case, under Alderman and Jones v. United States, 400 F.2d 134, vac. 395 U.S. 462.

See discussion hereinabove.

CONCLUSION

For the reasons stated hereinabove, it is respectfully submitted that an allowance to issue the writ of certiorari be granted to review the decision of the Court below.

Dated: San Francisco, California
August 19, 1970

Respectfully submitted,

EDWARD L. CRAGEN

For Petitioner,
Alan Randall Green

(Appendices "A", "B" & "C" follow.)

Appendices "A", "B" and "C"

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, vs. BOBBY RANDALL BATES, Appellant.	No. 24,777
UNITED STATES OF AMERICA, Appellee, vs. ALAN RANDALL GREEN, Appellant.	No. 24,778
UNITED STATES OF AMERICA, Appellee, vs. CLIFFORD DARRELL ISBELL, Appellant.	No. 24,779

UNITED STATES OF AMERICA, Appellee, vs. NICHOLAS EMANUEL PAPPAS, Appellant.	)	No. 24,780

[June 24, 1970]

Appeal from the United States District Court for the District of Nevada

Before: HAMLIN, ELY and CARTER, Circuit Judges.

JAMES M. CARTER, Circuit Judge:

Appellants were convicted for their participation in a plan to fly a load of marihuana into the United States from Mexico. All appellants were found guilty of one count of conspiracy to unlawfully import marihuana. Appellants Green and Pappas were also found guilty of one count of unlawfully importing marihuana; 21 U.S.C. 176a

and 18 U.S.C. 2. All appellants challenge their convictions on a variety of grounds. Four contentions merit discussion. None requires a reversal.

I. Motions to Suppress Evidence Made by Green and Isbell Were Properly Denied.

Smith, the government informer was equipped with a transmitting device. Conversations he had with the four appellants and others were transmitted and recorded under the supervision of customs agents. However, the recordings were not offered in evidence. Smith Testified to the conversations.

A party to a conversation may testify to what transpired although the conversation was recorded or transmitted by electronic devices. Lopez v. United States, 373 U.S. 427 (1963); On Lee v. United States, 343 U.S. 747 (1952).

We do not reach the question as to the propriety of entering the recording in

evidence or of using the testimony of agents who heard the conversation as it came over the transmitting device. The latter was the issue in United States v. White (7 Cir. 1969), 405 F.2d 838, cert. granted 394 U.S. 957 (1969), relied on by Green and Isbell. We find no error.

II. The Jury was Properly Given the Entrapment Question.

Green and Pappas contend they were entrapped into the marihuana conspiracy by the government informer, Smith. Both testified in support of their contentions. The trial court treated the question as one of fact and properly instructed the jury as to the entrapment defense. The jury's verdict showed the jurors' disbelief of appellants' contention. Appellants now claim that the entrapment question was a question of law that the court should have resolved in their favor.

A reading of the evidence indicates

the correctness of the trial court's actions. While it is conceded that Smith was instructed to assist in the apprehension of Pappas and Green, very little in his testimony suggests that the two were not willing participants in the smuggling scheme. Smith's testimony does not support appellants' contentions that they were extremely reluctant to enter the venture. Smith and his wife also testified as to prior drug dealings by the appellants.

We have held that entrapment is a question of law only where the evidence is substantially undisputed. Enciso v. United States (9 Cir. 1967), 370 F.2d 749. Here appellants presented a rather weak showing of entrapment which did not correspond to the account of the informer. The question was properly left to the jury.

III. There Was Sufficient Evidence to

Convict Isbell.

Isbell contends that there was insufficient evidence to permit the jury to find him guilty on the conspiracy count. We disagree.

Informer Smith testified that appellant Pappas called long distance from Mexico after he had purchased the marihuana. Green answered the phone and Isbell answered on the extension. Both talked to Pappas. Isbell questioned Pappas about a party who came back up from Mexico. Isbell asked Pappas when he would be back. After the phone conversation ended, Isbell said that he was tired of the delay, that he had a lot of money invested in Nick Pappas, and that he wanted to go East for a job. He asked that when "this transaction transpired" and the money arrived it be given to his wife, who would take

care of it. Green told Isbell not to worry because everything would be all right.

Evidence of a conspiracy must ordinarily be based on inferences drawn from competent circumstantial evidence. Miller v. United States (9 Cir. 1967), 382 F.2d 583, 586, cert. denied 390 U.S. 984 (1968); Oliva-Resendo v. United States, (9 Cir. 1966), 357 F.2d 124, 129, cert. denied 385 U.S. 856 (1966). We believe that Isbell's telephone conversation and statements provided a sufficient showing of his participation in the conspiracy.

Smith also testified that the day before the phone conversation, he had talked with Green outside the presence of Isbell. Green told him that Isbell had put up the [illegible] money in the marihuana purchase venture. Counsel for Isbell objected to the introduction of this evidence and asked to make a motion

outside the presence of the jury. Counsel then moved for a mis-trial as to Isbell because the Government's bill of particulars had not placed Isbell within the conspiracy at the time Green made his statement to Smith. The judge denied the motion. A reading of the bill of particulars makes clear that the Government had not stated that Isbell entered the conspiracy after the date of the Green statement. The motion was thus properly denied.

On proper objection, the motion might have been granted because the statement of Green was evidently not made in furtherance of the conspiracy but as merely a recitation of past facts. As such, it would not be an exception to the hearsay rule and would not bind Isbell. This objection, however, was never raised.

The trial court at various times during

the trial and in the final instructions to the jury properly and carefully instructed the jury that a defendant could not be found to be a conspirator on the basis of what some other conspirator or co-defendant might have said about him. A finding of participation could only be based on testimony of the defendant's own acts and statements showing he knowingly and conciously joined the conspiracy. In the fact of these curative instructions, we are not faced with plain error under Fed. Rules Crim. Proc. 52(b).

IV. Isbell Was Properly Sentenced.

Isbell was convicted of a violation of Count 1 of the Indictment and sentenced to five years in prison. Count 1 stated in pertinent part that Isbell "did . . . conspire . . . to commit an offense against the United States, that is to knowingly and with intent to defraud the United States import . . . 300 kilograms of

marihuana, in violation of Title 21, United States Code, Section (sic) 176(a)." The count specified thirteen overt acts and concluded with the language, "All in violation of Title 18, Section 371, United States Code."

Isbell contends that the trial court erred in sentencing him under 21 U.S.C. 176a rather than under 18 U.S.C. 371, the general conspiracy statute. Although Isbell concedes that the five year sentence he received was authorized under either statute, he claims that he was denied the possiblity of probation by being sentenced under §176a. The Government contends that despite mention of 18 U.S.C. 371, sentencing was required to be in accordance with 21 U.S.C. 176a. We agree with the Government's position.

21 U.S.C. 176a forbids a variety of acts relating to the introduction of marihuana into the United States. It

also provides for the punishment of anyone who "conspires to do any of the foregoing acts." Faced with two conspiracy statutes, one general and the other specific, the specific must control. Tanksley v. United States (8 Cir. 1963), 321 F.2d 647; United States v. Galgano (2 Cir. 1960), 281 F.2d 903; 910-11, cert. denied 366 U.S. 967 (1961); Davis v. United States (5 Cir. 1960), 279 F.2d 576; Georges v. United States (5 Cir. 1959), 262 F.2d 426, 431-32. As stated in Davis in connection with a narcotic conspiracy statute similar to 21 U.S.C. 176a: "Congress, when it enlarged the penalties, and prescribed minimum prison terms, for narcotic offenses, issued a command which is binding on the courts. The District Court was bound to impose sentence under 26 U.S.C.A. §7237 rather than under 18 U.S.C.A. §371, and the resulting sentence is not illegal." 279

F.2d at 578. This circuit has recently by order granting a writ of mandamus, voided a district judge's grant of probation to a defendant indicted and tried under 21 U.S.C. 176a but convicted and sentenced for a conspiracy under 18 U.S.C. §371 to violate 26 U.S.C. §4744a. United States v. Real, (No. 24,364, 2/10/70).

The transcript of sentencing further rebuts Isbell's claim. The trial judge observed that he would have imposed the same sentence, whether the sentence was under either §176a or §371. Therefore, Isbell would not have been given probation, and parole is now available under §176a as it always has been under §371.

Other matters raised by appellants have been considered and found to be without merit.

The judgments are Affirmed.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALAN RANDALL GREEN,

Appellant,

vs.) No. 24,778

UNITED STATES OF AMERICA,

Appellee.

APPEAL from the United States District Court for the _____ District of Nevada

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the _____ District of Nevada and was duly submitted.

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court, that the _____ judgment of said District Court in this Cause be, and hereby is affirmed.

Filed and entered June 24, 1970

APPENDIX "C"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALAN RANDALL GREEN, Appellant, vs. UNITED STATES OF AMERICA, Appellee.	No. 24,778

ORDER

Before: HAMLIN, ELY and CARTER, Circuit Judges.

Green having filed a motion to enlarge time for filing a petition for rehearing, and having tendered to the clerk the petition for rehearing,

ORDERED that the extension of time is granted, and the clerk is directed to file the petition for rehearing.

FURTHER ORDERED that the petition for rehearing is denied.

F I L E D
Jul. 22, 1970
Wm. B. Luck,
Clerk

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No. 806

In the Supreme Court of the United States

OCTOBER TERM, 1970

ADAM RANDALL GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
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406-542—70

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 605

ALAN RANDALL GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1970 (Pet. App. B). A petition for rehearing was denied on July 22, 1970 (Pet. App. C). Mr. Justice Black extended petitioner's time for filing a petition for a writ of certiorari until August 24, 1970, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction of conspiracy to smuggle marihuana.

2. Whether petitioner was entrapped as a matter of law.

3. Whether petitioner's conviction should be reversed because the jury became aware of the existence of tape recordings of certain conversations, none of which was introduced into evidence.

STATEMENT

Following a jury trial in the United States District Court for the District of Nevada, petitioner and several codefendants, including Clifford Darrell Isbell (the petitioner in No. 441, this Term), were convicted of conspiring to smuggle 300 kilograms of marihuana into the United States from Mexico, in violation of 21 U.S.C. 176a (C. Tr. 3–6, 197–200).[1] Petitioner was also convicted on a second count, charging that he knowingly received, concealed, and facilitated the transportation and concealment of the marihuana after its unlawful importation with intent to defraud the United States, in violation of the same statute (C. Tr. 6, 200).[2] On May 29, 1969, petitioner was sen-

[1] "C. Tr." refers to the clerk's transcript, containing the indictment, pleadings, and formal orders. "Tr." refers to the trial transcript, in four volumes. Copies of these documents were lodged by the government with the Clerk of the Court with our memorandum in opposition in No. 441.

[2] A third count, charging the smuggling itself (C. Tr. 6–7), was dismissed as to all defendants on the ground that the venue of that offense was the District of Arizona, rather than the District of Nevada (C. Tr. 192; 3 Tr. 517). See *infra*, p. 6.

tenced to six years' imprisonment on each count, the terms to run concurrently (C. Tr. 235). The court of appeals affirmed (Pet. App. A, B).

1. In late December 1967, one Jack Smith, after agreeing to assist the government as an informant against petitioner and codefendant Nicholas Pappas (for each of whom he had smuggled marihuana during the immediately preceding months, see *infra*), was released from jail in Los Angeles, California, where he had been in custody on an earlier charge of marihuana smuggling (2 Tr. 265–266, 370–377, 400–404). Although not a licensed pilot, Smith could fly an airplane and knew from experience how to navigate across the Mexican border so as to avoid detection by the Bureau of Customs' radar network (2 Tr. 331–332, 383; 3 Tr. 420). Following his release he returned to his home in Las Vegas, Nevada, and advised Pappas that he "was back" (2 Tr. 268–269, 403–404). On December 29, 1967, Pappas stopped at Smith's house and, upon being advised that Smith was out, told his wife that he wanted to talk to him. When Smith returned he called Pappas as requested and that evening Pappas visited Smith (2 Tr. 269–270). Smith got into Pappas' car and the two drove around for 20 or 25 minutes. Pappas said he "had to find a pilot" to bring a load of marihuana into the United States and asked Smith if he had one. Smith said no (2 Tr. 270–271). Pappas asked Smith if he would help "them" smuggle the load, observing that Smith "knew how to do it" and that it could be accomplished if he would help (2 Tr. 273). Smith agreed, but said he "didn't want any part of Alan Green

[petitioner]." Pappas replied that Smith would not have to do "any business with Alan" because he (Pappas) would "handle it" (2 Tr. 273–274).

In mid-January 1968, Pappas and Smith drove to Calexico, California, in an unsuccessful effort to locate Don Johnson, a pilot, whom they planned to use to fly the load of marihuana into the United States (2 Tr. 279–280). After returning to Las Vegas, they met with petitioner at the latter's apartment, which he shared with Pappas. The three discussed a prospective trip by Pappas and Smith to Los Angeles to meet Johnson, who had in the meantime been in communication with petitioner, and also a trip to Culiacan, Mexico, which Pappas and Smith proposed to take after seeing Johnson (2 Tr. 285–286). Pappas told petitioner he was taking $3,400 or $3,500 with him on the trip to Culiacan. In response to an inquiry by petitioner about whether that would "be enough," Smith said it would (2 Tr. 286–287).

On February 9, 1968, Pappas and Smith drove to Los Angeles, where they met Johnson and discussed the smuggling scheme. Pappas gave Johnson $410 or $420 with which to lease an airplane and told him that "this was his last chance, don't burn him again" (2 Tr. 288–290). The next day Pappas and Smith flew by commercial aircraft to Culiacan, Mexico, where Smith contacted one Manuel, a Spanish-speaking dealer in marihuana, and arranged a meeting between him and Pappas at which Smith interpreted (2 Tr. 221–222, 291–294). Manuel informed Pappas that the price of the marihuana would be $8 a kilogram. After

counting his money Pappas decided he had enough to buy 300 kilograms. He paid Manuel $2,000 and Manuel departed to "collect up the load" (2 Tr. 294–295). At the direction of Pappas, who remained behind, Smith then returned to Las Vegas and advised petitioner what had occurred in Culiacan (2 Tr. 295–300). In response to an inquiry by petitioner about when Pappas would be back, Smith said "just as soon as the airplane arrived in Culiacan to pick up the load." Petitioner said he had not heard from Johnson and did not know what had happened to him. At this time petitioner also told Smith that quite a few people had contributed money to the venture and that Isbell had put up the "first money" (2 Tr. 300–301).

On the following day, while petitioner, Smith, and Isbell were at petitioner's apartment, Pappas called petitioner from Mexico and simultaneously spoke with Isbell on an extension phone. After the call Isbell said he had a lot of money invested in Pappas and was getting tired of the delay. He also announced that he was leaving for the East in a few days, and gave instructions regarding the disposition of his share of the proceeds. Petitioner told Isbell not to worry and that everything would be all right (2 Tr. 301–304). On this occasion petitioner also received a telegram from Johnson advising that he had not yet succeeded in renting an airplane and that there would be an additional delay because of bad weather. Petitioner tore up the telegram and flushed it down the toilet (2 Tr. 306–307).

In mid-February 1968, Pappas returned to Las Vegas from Mexico and asked petitioner where Johnson was. Petitioner said that Johnson had "run off" and had not been heard from, that petitioner and Pappas had been "burnt again," and that they were just going to have to find another pilot (2 Tr. 309). Petitioner then called codefendant Bobby Bates, who agreed to fly the previously purchased marihuana up from Mexico (2 Tr. 310–312). On February 20, 1968, petitioner, Pappas, and Smith discussed details of the project with Bates (2 Tr. 312–315, 320, 322–323).

On February 24, 1968, following elaborate preparations in which petitioner took part (2 Tr. 324–331), Bates and Smith flew in a rented airplane from an isolated dirt airstrip near Parker Lake, Arizona, to Culiacan, where the marihuana bought by Pappas was loaded into the craft (2 Tr. 331–335). Manuel told Smith that "it was going to be a short load" because Pappas had been several hundred dollars short in his payment, but that if Pappas would come back and pay the balance he would let the "full 300 kilos" go. According to Smith: "I told Manuel if he [Pappas] wants to come back and pay you, but this is my last trip; that Mr. Pappas is taking over, as we had agreed prior to this." Manuel apparently then decided to permit the full 300-kilogram shipment to be delivered (2 Tr. 333–334). Bates and Smith then flew with the marihuana to Parker Lake, where they were arrested by agents of the Bureau of Customs on landing. During the flight Smith was at the controls until the plane reached flight altitude, after

which Bates took over and piloted the craft the rest of the way (2 Tr. 335–336).

After Bates and Smith had been "booked" at Nogales, Arizona, Bates (who in the meantime had also agreed to cooperate with the agents) flew with Smith and a Customs agent to Boulder City, Nevada. From there Bates and Smith, alone, followed by the Customs agents in another aircraft, flew the plane carrying the marihuana to North Las Vegas Air Terminal. Smith there called Pappas and told him that he and Bates had landed. Fifteen minutes later petitioner and Pappas arrived in petitioner's automobile and were arrested after they had commenced unloading the marihuana from the airplane into the car (1 Tr. 23–26, 31; 2 Tr. 336–340; 3 Tr. 471–473, 479–483).

2. After resting its case, the government, noting that defense counsel might have raised the issue of entrapment by questions asked of government witnesses on cross-examination, sought leave to reopen its case for the purpose of offering evidence with respect to petitioner's and Pappas' predisposition to commit offenses of the type for which they were on trial (3 Tr. 504, 506). Following an offer of proof by the government (3 Tr. 506–507), the court requested the attorneys for petitioner and Pappas to state whether their clients proposed to rely on entrapment as a defense (3 Tr. 544–546). Without objection, the attorneys said they did and, in response to further inquiry by the court, advised that if the government had relevant evidence they preferred this to be presented before the defense presented its case (3 Tr. 548–549).

Upon being permitted to reopen its case, the government introduced evidence showing that for a period of five or six months preceding the events involved here Smith had smuggled marihuana for petitioner, Pappas, and others (3 Tr. 551–578); that petitioner and Pappas, while Smith was in jail immediately prior to the offenses involved here, had sought to induce Smith's wife, a native of Mexico, to assist them in smuggling marihuana from Mexico in exchange for their arranging to secure Smith's release on bail (3 Tr. 580–584); and that Customs Agent Diaz, the officer in charge of the investigation that led to the present prosecution, had been advised by informants other than Smith that petitioner and Pappas were engaged in marihuana smuggling (3 Tr. 593–599).

Both Pappas and petitioner thereafter took the stand in their own defense. Pappas testified (in substance) that Smith had entrapped him into participating in the incriminating activities (3 Tr. 621–654). Petitioner's defense was that he was entirely innocent. He stated that all of his activities, about which the prosecution's witnesses had testified, had been performed simply as favors to Pappas and that he was the innocent victim of circumstantial evidence (3 Tr. 655–680). The issue of entrapment was submitted to the jury (4 Tr. 814–815).

ARGUMENT

1. Petitioner contends the evidence is insufficient to sustain his conviction (Pet. 33–38, 53–56). But as the recital indicates, the evidence was not simply sufficient, but overwhelming. With respect to the count-1

charge that he conspired to smuggle the shipment of marihuana into the United States, the government's evidence established that petitioner, far from being an innocent bystander, was, with Pappas, the central figure in the conspiracy. With respect to the count-2 charge that petitioner knowingly received, concealed, and facilitated the transportation and concealment of the marihuana after its unlawful importation, the evidence was likewise substantial. That charge was based on petitioner's participation in the unloading of the marihuana from the plane to his automobile at the North Las Vegas Air Terminal following its unlawful importation. It is immaterial that Bates, who together with Smith had flown the marihuana into the United States, had been arrested prior to the events at the Air Terminal and was cooperating with the government agents at that time. While the conspiracy had then come to an end so far as Bates was concerned, that did not affect the character of the marihuana as unlawfully imported contraband smuggled with petitioner's knowledge. Cf. *Pederson* v. *United States*, 392 F. 2d 41, 43–44 (C.A. 9); *United States* v. *Gould*, 419 F. 2d 825, 827 (C.A. 9); *Haynes* v. *United States*, 319 F. 2d 620 (C.A. 5), certiorari denied, 375 U.S. 885. In any event, since petitioner's sentence on count 2 runs concurrently with his sentence on the conspiracy count, there is no need for further review of the count-2 conviction. Cf. *Benton* v. *Maryland*, 395 U.S. 784, 791; *Hirabayashi* v. *United States*, 320 U.S. 81, 85.

2. As to petitioner's contention that he was entrapped as a matter of law (Pet. 38–45), there was no evidence that informant Smith lured or enticed petitioner into committing an offense he would otherwise not have attempted—the essence of the defense of entrapment (*Lopez* v. *United States*, 373 U.S. 427, 434–436; *Sherman* v. *United States*, 356 U.S. 369, 376; *Masciale* v. *United States*, 356 U.S. 386; *Sorrells* v. *United States*, 287 U.S. 435, 442).[3] It is not entrapment for a government agent or informant merely to "afford opportunities or facilities for the commission" of an offense. *Sorrells* v. *United States*, *supra*, 287 U.S. at 441; *Sherman* v. *United States*, *supra*, 356 U.S. at 372; *Lopez* v. *United States*, *supra*, 373 U.S. at 436. The informant here did no more.[4]

The government is entitled to rebut a defense of entrapment by offering evidence of the accused's criminal predisposition to commit offenses of the type charged, including evidence of prior convictions for such offenses. *Sherman* v. *United States*, 356 U.S. 369, 375–376. Such predisposition evidence, absent some indication that the defense proposes to assert the defense of entrapment, would of course not normally be

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[3] Indeed, petitioner himself, in testifying, made no such claim.

[4] The record does not support the allegation, on which petitioner particularly relies (Pet. 18, 38, 43), that Smith's "credit with Manuel" was "utilized by the government" in the transaction. Pappas gave Manuel the $2,000 principal cash payment; while the record is unclear as to precisely what agreement was reached between Manuel and Smith at their final meeting, where they discussed financial arrangements for the unpaid portion of the full 300-kilogram load, it appears that any "credit" that may have been involved was extended by Manuel to Pappas and not Smith (*supra*, p. 6).

admissible. But here, as government counsel noted in his request for leave to reopen, defense counsel had indicated that they might urge the defense of entrapment. The court, upon the government's motion, recognized the problem of reconciling the defendants' right to raise the issue of entrapment without testifying and the government's right to counter by offering predisposition evidence. The court resolved the problem by requiring each defendant, through his attorney, to state whether he elected to rely on entrapment. There was no objection to the procedure and the attorneys for both petitioner and Pappas said, in response to the court's further inquiry, that they preferred the government's predisposition evidence to be presented before the defense presented its case.

3. On the occasions of his visits (at his hosts' invitation) to the Las Vegas apartment in which petitioner and Pappas resided, Smith had concealed on his person a transmitting device by which government agents stationed in another part of the building recorded the conversations that occurred in the apartment (2 Tr. 386–387, 398–399; 3 Tr. 440–441; 4 Tr. 683–691).[5] In addition, through a "suction cup with a recorder on it," attached to a telephone handset located in a Las Vegas hotel room that Smith occupied, the agents were able to record, with Smith's knowledge

[5] The agents also once recorded, on a portable tape recorder, a conversation between Smith, petitioner, Pappas, and Bates in a restaurant located at a Las Vegas golf course (3 Tr. 490–493). Although the record is unclear on the point, the making of this recording was apparently also accomplished by means of a transmitting device attached to Smith's person.

and consent, telephone calls received by Smith from, and placed by Smith to, the apartment of petitioner and Pappas (2 Tr. 384–385; 3 Tr. 441–442, 447).[6] Prior to trial, transcripts of the recorded conversations were made available to the defense by the government (Pet. 57). At trial, no recording was offered in evidence by the government as part of its case in chief, but after petitioner and Pappas had testified in their own behalf and the defense had rested, the government sought to introduce certain of the recordings in rebuttal (4 Tr. 682–694). Viewing these as possibly prejudicial to codefendants who had chosen not to testify (and as to whom the recordings were consequently not admissible for rebuttal purposes), the court declined in its discretion to admit the recordings (4 Tr. 697). As a consequence, no recording was heard by the jury.

Petitioner contends the government acted unlawfully in recording the conversations and that although

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[6] Whether there were any such conversations does not, however, clearly appear.

In addition, the agents once installed a monitoring device in a motel room they had rented (at a Holiday Inn in Los Angeles) and to which Smith and Pappas went on the occasion of their February 1968 consultation with the prospective pilot Johnson (*supra*, p. 4). Through a recording device in an adjacent room, occupied by the agents, the agents were able to record the conversation between Smith, Pappas, and Johnson. This monitoring was also accomplished with the knowledge and consent of Smith (2 Tr. 288–290, 378–380; 3 Tr. 433–435). Petitioner was not present on this occasion and so was not a party to the conversation.

no recording was introduced into evidence, he was nevertheless improperly prejudiced by the very presence of the tapes and recording devices in the courtroom and by the fact that the existence of the recordings came to the attention of the jury through interrogation of witnesses and otherwise (Pet. 26–31, 56–62). However, it was through cross-examination of Smith by defense counsel (the attorney for Isbell, but without objection by any other attorney) that the jury first became aware that the recordings in question had been made (2 Tr. 378–381, 384–387, 398–399).[7]

United States v. *White*, 405 F. 2d 838 (C.A. 7), certiorari granted, 394 U.S. 957, restored to calendar for reargument, 396 U.S. 1035, cannot affect petitioner's case; there the agents testified concerning the contents of conversations overheard through an electronic listening device concealed on an informant. However, in this case there was no such testimony and whether recording the conversation was, in itself, permissible, see *Lopez* v. *United States*, 373 U.S. 427, 437–440; *Rathbun* v. *United States*, 355 U.S. 107, 110, is not at issue because the contents of the recordings were not made known to the jury. Thus, there is no occasion for the Court to defer disposition of this petition.

[7] Since the government made transcripts of the tapes available to defense counsel prior to trial and since the circumstances surrounding the monitoring were made known there is plainly no occasion to remand for a district court hearing pursuant to the procedure prescribed in *Alderman* v. *United States*, 394 U.S. 165.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 605

ALAN RANDALL GREEN,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit.

Petition For Rehearing

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In the Supreme Court of the

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October Term, 1970

No. 605*

ALAN PANUAL GREEN,	)
Petitioner,	)
versus	)
UNITED STATES OF AMERICA,	)
Respondent.	)

On Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit

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Petition for Rehearing.

This Petition for Rehearing is respectfully sought after denial of certiorari on November 16, 1970, and is confined to circumstances which have intervened since the filing of the Reply Brief herein, which circumstances

are of substantial effect, to wit, oral argument on October 22, 1970 and this Court's forthcoming decision to be announced in Dutton v. Evans, No. 104, October Term, 1970. Rule 58, 28 U.S.C., U.S.Sup.Ct.

QUESTIONS PRESENTED ON REHEARING

This petition for rehearing is restricted to the following questions:

1. Without evidence aliunde of the continuance of a conspiracy, does the presumption of its continuance shift the burden of proof to the defendant and compel him to testify in violation of his 5th Amendment privilege against self-incrimination?

2. Whether, in a conspiracy prosecution, prosecutorial use of statements of a non-testifying co-conspirator made outside the United States violate the confrontation clause of the 6th Amendment and the due process clause of the 5th Amendment where the declarant is not; and

never was, subject to compulsory process under the 6th Amendment?

The presumption of a continuing conspiracy shifts the burden of proof to the defendant compelling his testimony in violation of the 5th Amendment.

The presumption of the existance of a conspiracy which continues unless or until there is evidence aliunde of its termination, is squarely in conflict with the presumption of innocence. The former presumption effectually compels an accused to take the stand and explain when and if there was in fact a termination of the conspiracy. This places him in a position where he must testify to the highly incriminating fact of knowledge of the prior existence of the conspiracy (or to assume its existence) and implicate himself with participation therein.

In the case at bench, because of the confusion caused by the existence of

the presumption, the trial court permitted the government to adduce before the jury highly prejudicial evidence of events which transpired after the alleged conspiracy had terminated.

Viewing the evidence in the light most favorable to sustain the conviction, a conspiracy was entered into in the District of Nevada with its object being to smuggle marihuana into the United States from Mexico by air. (C.T. 3-6) Petitioner was present during the early discussions concerning the rental of the aircraft. (R.T. 672) He had no financial interest in the venture. Transporting the contraband by airplane into the United States from Mexico, co-conspirators Bates and Smith were arrested at a landing strip at Parker Lake in the State and District of Arizona. At that time and place, the entire load of marihuana was seized by customs agents. (R.T. 337) Bates and Smith were arraigned before the commissioner in the District of Arizona

and the contraband was transported in the airplane under the control of customs agents from the State and District of Arizona to Las Vegas Airport in the State and District of Nevada, the district wherein petitioner's trial was had. (R.T. 53; 59; 337) At the Las Vegas Airport, one of the arrested co-defendants was ordered to call petitioner on the telephone in order to arrange for a ride from the airport where the airplane containing the cargo of marihuana in custodia legis had been landed. (R.T. 662) The arrested co-defendant and another charged defendant began unloading the cargo, untouched by petitioner, when an awaiting government agent drove to the vicinity of the aircraft in the "Follow Me" truck and placed petitioner under arrest. (R.T. 663)

But for the confusion surrounding the presumption of the continuance of the alleged conspiracy, the trial court could not have allowed the jury to hear the highly

prejudicial evidence regarding the contraband in the presence of petitioner and its physical presence in the District of Nevada after it had been seized by the government in the District of Arizona.

This court has recently found a long-standing irrational presumption unconstitutional. See Leary v. United States, 395 U.S. 5 (1960) wherein the court held it was irrational and therefore unconstitutional to presume knowledge of illegal importation of marihuana from mere possession.

Because there is no rational connection between the fact proved and the ultimate fact, it interjects caprice into the trial by directing the trier of fact to treat something as true which might well be contrary to the facts. It conflicts with the reasonable doubt standard. The Leary presumption, together with its concomitant instruction, directed a conviction in situations where the government had failed to prove the corpus delicti of

the offense charged. The continuing-conspiracy presumption is tantamount to directing a conviction for the crime of another.

When a conspiracy, once established, is presumed to continue, the jury is directed to hold the accused responsible for the acts of all the co-conspirators during its continued existence, unless he explains his disassociation to their satisfaction. To do this, he must implicate himself in prior membership.

This is in conflict with this court's ruling in Griffin v. California, 380 U.S. 609 (1965) and Mallov v. Hogan, 378 U.S. 1 (1964), being violative of a defendant's privilege against self-incrimination.

Evidence-wise, the presumption is a prosecutor's clincher for guilt.

In accord with the presumption of innocence and the privilege against self-incrimination, proof of the continuance of a conspiracy should be accomplished only with evidence independent of the presumption.

Under this court's holding to be announced in Dutton v. Evans, supra, the prosecutorial use of implicating declarations of a non-available co-conspirator, made outside the United States, violates the confrontation clause of the 6th Amendment.

Petitioner does not wish to appear presumptious as to what this court's holding will be when Dutton v. Evans (supra) is announced. If petitioner's position is in accord with the forthcoming opinion, it is requested that he get the benefit of being before the court when it is announced. The time for filing this petition terminates December 11, 1970. If petitioner's position is not in accord with Dutton v. Evans, supra, of course, a summary denial herein is in order.

In petitioner's trial, informant Smith was the major government witness. He testified and was examined at length about conversations in furtherance of

the conspiracy, the conversations having taken place in Mexico with one "Manuel" who was Smith's "connection".

On one occasion, alleged co-conspirator Pappas was present in Mexico and the subject matter of the conversations was the negotiation, bargaining and contracting for the purchase of the contraband. Another separate occasion was when alleged co-conspirator Bates was present in Mexico and the subject matter of the conversations was payment and credit arrangements whereby Smith was able to obtain the "full load" of marihuana on partial consignment due to Smith's previous dealing with Manuel. Smith was the only witness who had prior acquaintance with Manuel. His convenient memory did not include Manuel's surname. Bates and Pappas spoke only English and did not speak or understand Spanish. Manual was a resident of Culiacan, Mexico. He understood and spoke only Spanish and had no knowledge of English. The only party to

all of the conversations with Manuel who could speak both English and Spanish was government informant Smith who testified that he acted as interpreter.

The speculation of what was lost or misinterpreted in the translation is a challenge to the imagination.

The impact of these conversations necessarily was damaging upon the jury which was charged to determine the validity of the highly technical defense of entrapment.

Residing in Mexico, Manuel was not subject to compulsory process as required by the 6th Amendment and could not be confronted and cross-examined as to these alleged conversations.

In comparing petitioner's factual situation with the facts in Dutton v. Evans, supra, Smith's testimony to the voluminous declarations made by Manuel on the various occasions was much more damaging and prejudicial than the single

statement made on one occasion attributable to Williams by prosecution witness Shaw. Neither Manuel (the declarant in petitioner's case) nor Williams (the declarant in Dutton v. Evans) was before the court and subject to confrontation and cross-examination. Williams was subject to the compulsory process of the court for whatever such might be worth. Manuel was beyond the jurisdiction of subpoena.

Confrontation and cross-examination of Smith cannot cure the lack of confrontation of Manuel. Evans v. Dutton, 400 F.2d 826 (5th Cir., 1968). As Cowin, J., stated therein at page 830:

> "A criminal defendant cannot, consistent with the confrontation clause, be convicted upon the testimony of phantom witnesses whose credibility is unknown and unknowable by the trier of fact."

Petitioner submits that this reasoning is consonant with the

rationale of the confrontation clause of the 6th Amendment and that it will be restated and adopted by this court in the announcement of its decision in Dutton v. Evans.

CONCLUSION

This petition is restricted to the grounds herein specified and it is submitted that rehearing should be granted in light of the court's opinion forthcoming in Dutton v. Evans, supra,*/

Dated: December 4, 1970

Respectfully submitted,

Edward L. Cragen
For Petitioner.

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*/ There should be no concurrent-sentence-mootness doctrine problem herein. Cf. Hirabayashi v. United States, 320 U.S. 105 (1943) and Benton v. Maryland, 395 U.S. 784 (1968). In that substantive count 2 was based upon the transportation of the marihuana within the District of Nevada and that its presence in the District of Nevada was solely due to the positive acts of the government in removing the contraband from the District of Arizona after it was in custodia legis, petitioner's conviction and concurrent sentence thereon was clearly erroneous. See comment of the trial judge in

acquitting petitioner of Count 3 of the indictment, the remaining count charged:

"THE COURT (to the prosecuting attorney): That is where you and I part company, because the transportation from Parker Field, Arizona, to Las Vegas, Nevada, was under compulsion; there was a complete hiatus in the causation, and the transportation, that portion of the transportation was caused by the Government agents." (R.T. 514)

And,

"THE COURT: * * * the defendants alone, jointly or in conspiracy, did not cause the transportation of the marihuana from Parker Lake, Arizona, to Las Vegas, Nevada." (R.T. 517)

CERTIFICATE OF COUNSEL

Edward I. Cragen, hereby certifies that he is the attorney for petitioner herein and that he is an active member of the bar of the United States Supreme Court. He has prepared and read the foregoing petition for rehearing and in his opinion the same is well founded in Law and proper to be filed herein. The petition is brought in good faith and is not presented for purposes of delay or vexation.

Dated: December 4, 1970

Edward I. Cragen
For Petitioner